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NO. 87-1061

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

JERRY TARKANIAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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STATEMENT OF THE CASE

On September 7, 1977, the University of Nevada, Las Vegas ("UNLV") suspended Jerry Tarkanian ("Tarkanian") from his employment as Head Basketball Coach and ordered him to refrain from any and all relations with UNLV's intercollegiate athletic program for a period of two years.[1] Tarkanian was suspended by UNLV at the insistence of the National Collegiate Athletic Association ("NCAA") following a four-year investigation by the NCAA of alleged infractions of NCAA rules by Tarkanian and other individuals connected with UNLV's basketball program.[2]

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[1] The suspension was effective as of 5:00 p.m. on September 9, 1977. On September 8, 1977, Tarkanian initiated the present litigation and obtained preliminary and later permanent injunctive relief against the suspension.

[2] The NCAA claims it only "recommended" suspension. However, UNLV was given three choices: (1) suspend Tarkanian; (2) reject the NCAA-mandated sanction and risk still heavier sanctions such as indefinite probation for UNLV; or (3) pull out of the

Jerry Tarkanian has been a tenured professional employee of UNLV since July 1, 1977, with a continuing appointment as "Head Basketball Coach and Prof. of Physical Education." However, Tarkanian's only services for UNLV since his initial appointment in the spring of 1973 have been as Head Basketball Coach.[3] Tarkanian's employment agreement with UNLV provided that if he did not continue his duties as Head Basketball Coach, he could remain as Assistant Athletic Director or

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NCAA. Withdrawal from the NCAA or even an indefinite probation would have resulted in economic hardship for UNLV, with a ban on post-season play and television appearances for all sports. In reality, UNLV had no choice but to suspend Tarkanian. As Arthur Reynolds, Chairman of the NCAA Committee on Infractions, observed, the NCAA is the "only game in town."

3 Tarkanian had been a head basketball coach for 17 consecutive years prior to his appointment at UNLV. When Tarkanian was hired by UNLV, the president of that institution agreed to renew Tarkanian's one-year contract until he qualified for tenure.

Director of Community Relations for the Thomas-Mack Arena, but with a reduction in his yearly salary by some $72,000.

UNLV is organized and exists under the constitution and laws of the State of Nevada and is financed by state funds. As a member institution of the NCAA, UNLV contractually agreed to administer its athletic program in accordance with NCAA rules and regulations. As a condition of its membership, UNLV delegated to the NCAA authority to investigate and determine violations of NCAA rules by representatives of UNLV, and to impose penalties or sanctions upon UNLV for any violations. Sanctions available to the NCAA include requiring the member institution to suspend or even terminate athletic department personnel implicated in any violation.

Investigations into alleged infractions are conducted by the NCAA investigative staff ("staff") on behalf of the association's Committee on Infractions ("Committee"). Staff typically conducts a preliminary inquiry to determine if there is sufficient evidence to warrant an official inquiry by the Committee. If the Committee authorizes an official inquiry, staff then conducts such inquiry. The Committee has never refused a request by staff for authorization to issue an official inquiry. In practice, the Committee simply rubberstamps staff's decision to issue the official inquiry without knowledge of any details which may or may not support that decision.

On or about February 26, 1976, after staff had conducted a three-year preliminary inquiry into UNLV's athletic policies and practices, the Committee issued an Official Inquiry to UNLV.

Approximately half of the 72 infractions initially alleged concerned the UNLV basketball program under Tarkanian. Several alleged infractions involved Tarkanian personally. The NCAA gave UNLV a June 1, 1976, deadline by which to respond to the Official Inquiry.

After receiving the Official Inquiry, UNLV enlisted the Office of the Attorney General of the State of Nevada ("Attorney General") and retained private counsel to conduct an investigation to determine if and how each alleged violation occurred. The NCAA Manual contained no guidelines, policies, or procedures governing the type of response to be made by UNLV, the conduct of its investigations, or the conduct of NCAA hearings.[4] Consequently on March 24, May 13, and May 21, 1976, the

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[4] The NCAA Manual provides that "[t]he exact procedure to be followed in the conduct of the hearing will be determined by the committee."

Attorney General requested Warren S. Brown ("Brown"), then Assistant Executive Director in charge of the NCAA enforcement division, to provide a definitive outline of the procedures for UNLV to follow.[5] Unbeknownst to UNLV and Tarkanian, the policies and procedures had never been codified but were scattered throughout Committee minutes. Despite UNLV's repeated requests for procedural guidelines, Brown did not respond to the Attorney General until June 2, 1976, after the deadline for a response had passed.[6]

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[5] The Attorney General's questions included: who will be allowed to attend the NCAA hearings; may UNLV bring witnesses; is cross-examination permitted; what type of evidence will be allowed; will sworn affidavits be given greater weight than hearsay statements; what is and who has the burden of proof; and may a reporter transcribe the hearing?

[6] Brown did confirm that UNLV's request for an extension of time to file its response had been granted.

Brown replied to the Attorney General's inquiries as follows: (1) while UNLV was required to submit to the Committee all available information related to the allegations, the NCAA would not reveal to UNLV any information provided by individuals interviewed by staff investigators; (2) at the hearing, staff would disclose the identity of its sources as well as any details or evidence reported by individuals interviewed by staff; (3) only individuals officially representing the university could be present at the infractions hearing; (4) only the Committee could present witnesses; (5) UNLV's representatives could "debate" any of the information reported to the Committee; (6) only a tape recording and no transcript of the hearing would be authorized; and (7) UNLV had to assume the burden of proof.

Despite UNLV's request that the NCAA abide by its bylaw that it give a member under investigation notice of the facts on which specific charges were based, the NCAA refused to follow its own rules.[7] Unaware of the basis of staff allegations, UNLV and Tarkanian were therefore unprepared at the first and second sessions of the Committee hearing to explain why a particular source purportedly gave different answers on the same question to different people at different times.

Lacking guidance as to the form of evidence expected by the Committee, UNLV conducted its investigation upon the

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[7] NCAA Bylaw 7-5-(c) provides that a member under investigation:

(1) Shall be given notice of any specific charges against it, and the facts upon which such charges are based; and

(2) Shall be given an opportunity to appear before the Committee on Infractions (or Council upon appeal) to answer such charges by the production of evidence.

(Emphasis added.)

assumption that affidavits or sworn statements and documentary evidence would be more persuasive. One set of UNLV's official response consisted of a restatement of each allegation, a statement indicating whether UNLV agreed that a violation had occurred, and two file boxes full of affidavits, sworn statements or depositions, and documentary evidence supporting UNLV's denials of allegations. Although prior to the hearing neither UNLV nor Tarkanian knew what facts or information staff had developed or would present to support the allegations, the NCAA staff studied UNLV's official response and contacted persons who had supplied UNLV with affidavits or sworn statements.

By letter received only five days before the hearing, the NCAA informed UNLV that any current UNLV employee named in an allegation could be represented by legal

counsel. The notice came too late for Tarkanian, who did not have legal counsel present because his attorney had made other commitments as a result of the NCAA's prior position that only UNLV attorneys could be present.

When the infractions hearing was held on November 14, and December 13 and 14, 1976, staff's presentation on allegations involving Tarkanian consisted entirely of three unsworn NCAA staff investigators, David Berst ("Berst"), Hale McMenamin ("McMenamin"), and William Hunt ("Hunt"), orally relating their or another investigator's recollection of conversations with certain individuals concerning their purported knowledge of facts or hearsay regarding violations of NCAA legislation. The investigators based their remarks solely upon memoranda of interviews which had not been reviewed for inaccuracies by the purported interviewees

and which were not supported by a scintilla of documentary evidence. The notes which formed the basis of the memoranda, often prepared long subsequent to the interview, were destroyed prior to the hearing. The memoranda were not made available to Tarkanian, his legal counsel, UNLV, or its legal counsel, despite several requests prior to and at the infractions hearing.

Since the NCAA refused to disclose its sources of information for the allegations against Tarkanian and UNLV, the Attorney General and UNLV asked its interviewees whether they had provided information to the NCAA contrary to that which they had given UNLV. They said they had not. All of the evidence uncovered by UNLV's counsel and the Attorney General revealed Tarkanian's complete innocence of the allegations.

When UNLV and Tarkanian appeared at the infractions hearing, they heard for the first time the "facts" behind the allegations and the identity of each person who provided the "facts." Nevertheless, as the Chairman of the Committee observed, in every material instance the oral testimony given by staff to support the allegations against Tarkanian conflicted directly with the affidavits, statements and depositions obtained by UNLV's counsel and the Attorney General from staff's own sources.

During the course of the hearings, the NCAA conceded that at least eight allegations concerning Tarkanian lacked sufficient information to support a finding of a violation. Staff investigator Berst even admitted that one allegation he made against Tarkanian was based on pure speculation.

After the December session of the hearing, UNLV and Tarkanian received information which suggested that Berst and McMenamin had provided false and misleading information on crucial issues. At a special and limited hearing conducted by the Committee for purposes of determining whether it had been intentionally misled by its investigators, staff took the position, incredibly upheld by the Committee, that it had the right to misrepresent the facts! When Tarkanian's attorney attempted to question Berst about his relationship with one source, the Committee refused to allow disclosure of the source's identity on grounds of confidentiality.

On April 26, 1977, the NCAA mailed to UNLV a Confidential Report, later recast as the Expanded Confidential Report, consisting of its findings and penalties to be imposed. Tarkanian was named in 10

of the 38 violations found by the Committee. The Committee issued its findings in Confidential Report No. 123(47) which directed UNLV to show cause why additional penalties should not be imposed against it if it did not suspend Tarkanian from involvement with the University's intercollegiate athletic program for two years. On May 13, 1977, UNLV gave written notice of its appeal of certain findings and penalties, including all findings involving Tarkanian, to the NCAA Council ("Council").

At the appeal hearing on August 22, 1977, the Council did not have before it any transcript or tape recording of the Committee hearings, and few evidentiary documents. During the course of its deliberations, the Council summoned Berst, McMenamin and Hunt in order to interrogate them about their integrity, veracity, and objectivity, a major issue raised and

argued by UNLV in its appeal. This ex parte session occurred without notice to, knowledge of, or participation by Tarkanian or UNLV. The Council did not even make a tape recording of the session, during which nearly all of the Council members questioned the investigators. At the conclusion of its deliberations, the Council voted to affirm the Committee's findings and penalties en masse.

On August 26, 1977, the NCAA issued a 10-page release to the media. It summarized the Committee's findings involving Tarkanian, at least two of which charged him with dishonest, immoral, or illegal conduct. As a direct result of the NCAA's action against Tarkanian and UNLV and the publicity attendant thereto, several contracts which Tarkanian had received to conduct basketball coaching clinics in Colorado, New Mexico, Missouri,

and California were cancelled by the sponsors.

On September 6, 1977, UNLV conducted a hearing, presided over by Dr. Brock Dixon as hearing officer, to determine disciplinary or corrective action to be taken against Tarkanian in accordance with the directive of the NCAA. The sole presentation made by UNLV at this proceeding consisted of having Dr. Lorne Seidman, counsel for UNLV, read and question Tarkanian about the findings involving Tarkanian contained in the Expanded Confidential Report. Although Dr. Dixon found that the factual basis for the NCAA's charges and sanctions as they applied to Tarkanian was clearly in doubt, he concluded that UNLV was contractually compelled to adopt the findings and penalty contained in the NCAA's Expanded Confidential Report. The alternatives were heavier sanctions or complete

withdrawal from the NCAA. The President of UNLV, Donald H. Baepler, accepted the hearing officer's recommendation and on September 7, 1977, UNLV gave Tarkanian written notice that the NCAA penalty against Tarkanian would become effective at 5 p.m., Friday, September 9, 1977. When President Baepler's efforts to persuade the NCAA to impose some alternative disciplinary action proved futile, Tarkanian instituted the present litigation.

REASONS FOR DENYING THE PETITION

I. The State Action Holding Is Consistent With Settled Law.

To constitute state action, the conduct allegedly causing the deprivation of a federal right must be "fairly attributable to the state." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). This requirement is satisfied when public officials and a private entity act jointly or in concert with one another to cause the deprivation. Lugar, 457 U.S. at 937; Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). State action will also be found when a private party is serving a function which is "traditionally the exclusive prerogative of the State." Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)); Rendell-Baker, 457 U.S. at 842.

As the court below noted, UNLV delegated to the NCAA its authority to discipline Tarkanian for violations of NCAA rules. By imposing the NCAA-ordered sanctions against Tarkanian, UNLV acted jointly with the NCAA. "It is well settled that prohibited action taken in concert by public officials and a private entity is state action regardless of whether the ultimate illegal sanctions were imposed by the private entity or a public official." Adams v. Bain, 697 F.2d 1213, 1217 (4th Cir. 1982) (citing Adickes, supra).

Furthermore, as the court below properly held, Jerry Tarkanian is a state employee, and the right to discipline a state employee in Nevada is traditionally the exclusive prerogative of the state. See NRS 396.320; Board of Regents of University of Nevada v. Oakley, 97 Nev. 605, 637 P.2d 1199 (1981); State ex rel.

Richardson v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953). In ordering Tarkanian suspended, the NCAA performed a function which is traditionally the exclusive prerogative of the state. Accordingly, the court below correctly held that the conduct of the NCAA constituted state action.

Neither this Court's holding in San Francisco Arts & Athletics v. U.S. Olympic Committee, 483 U.S. ___ (1987), nor recent federal decisions involving the NCAA dictate a different result. In San Francisco Arts & Athletics, this Court declined to find state action by the U.S. Olympic Committee in enforcing a statute which gave it the exclusive right to the use of the word "Olympic" because "[t]he Act merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct nor the coordination

of amateur sports has been a traditional government function." 483 U.S. at ___ (footnotes omitted).

Similarly, in each of the recent decisions involving the NCAA, the court has held that the promulgation and application by the NCAA of legislation prohibiting or restricting participation by student-athletes in NCAA-sponsored events did not constitute state action. Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987) (hockey player declared ineligible); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986) (football player declared ineligible); Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984) (tennis player declared ineligible); Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987) (basketball team placed on probation and barred from post-season competition); Barbay v. NCAA, No. 86-5697 (E.D. La. 1987) (football player declared ineligible); McHale v.

Cornell University, 620 F. Supp. 67 (N.D.N.Y. 1985) (football player declared ineligible). The courts declined to find state action because "[t]his conduct was taken as part of the NCAA's function in regulating intercollegiate athletics." Graham, 804 F.2d at 958.

This case is significantly different. The conduct of the NCAA, in ordering UNLV to suspend Tarkanian, involved much more than the "conduct and coordination of amateur sports" or the "regulation of intercollegiate athletics." In imposing this particular sanction, the NCAA interfered with and attempted to sever the employment relationship between a state university and its tenured professional employee. The NCAA in effect assumed the role of public employer for purposes of discipline. Such conduct by a private actor in connection with a public institution consistently has been held to

constitute state action. Cf. Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986); Krynicki v. University of Pittsburgh, 742 F.2d 94 (3d Cir. 1984); Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982); McVarish v. Mid--Nebraska Community Mental Health Center, 696 F.2d 69 (8th Cir. 1982).

Nothing in the decision of the court below provides justification for this Court to grant a writ of certiorari on the issue of state action. The court below recognized the distinction between the cases relied upon by petitioner and the case before it. The court properly applied the tests utilized by this Court to determine state action, as set forth above, and only after "sifting facts and weighing circumstances," Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), concluded that the conduct of the NCAA rose to the level of

state action. Accordingly, the petition should be denied.

II. The NCAA Hearings Did Not Satisfy The Requirements Of Procedural Due Process.

Tarkanian has a property interest in his employment as Head Basketball Coach at UNLV by reason of his employment contract. Tarkanian also has a liberty interest in his position, which has been impaired because the NCAA's findings impugned his reputation and stigmatized his freedom to take advantage of other employment opportunities. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538, 542 (1985); Paul v. Davis, 424 U.S. 693, 710-11, reh'g denied, 425 U.S. 985 (1976); Goss v. Lopez, 419 U.S. 565, 572-73 (1975); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70, 572, 573-74, 576-77 (1972); Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977);

Wright v. Arkansas Activities Association, 501 F.2d 25 (8th Cir. 1974). These constitutionally protected interests entitle Tarkanian to a hearing which "must be granted at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (emphasis added); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). A meaningful opportunity to be heard includes the "right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence." Brock v. Roadway Express, Inc., ___ U.S. ___, ___ (1987). Due process requires an opportunity to refute the charges. See Loudermill, 470 U.S. at 544; Mathews v. Harney County, Or., School Dist. No. 4, 819 F.2d 889, 893-94 (9th Cir. 1987).

The NCAA never informed Tarkanian of the substance of the relevant evidence supporting the charges against him;

instead, the evidence presented by staff consisted only of staff's own recollections of conversations with other investigators and interviewees. Considering the gravity of the charges and the extent of the resultant deprivation, the NCAA failed to provide Tarkanian with a meaningful opportunity to be heard. Cf. Washington v. Kirksey, 811 F.2d 561, 563-64 (11th Cir.), cert. denied, ___ U.S. ___ (1987); Stanley v. Big Eight Conference, 463 F. Supp. 920, 931-33 (W.D. Mo. 1978).

Fair play is the "essence of due process." Galvan v. Press, 347 U.S. 522, 530, reh'g denied, 348 U.S. 852 (1954); see also Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 33, reh'g denied, 453 U.S. 927 (1981). As the trial court and the court below recognized, in Tarkanian's case, the NCAA did not play fairly. See A12, A36.

III. The NCAA's Decision To Suspend Tarkanian Deprived Him Of Substantive Due Process.

Substantive due process of law is the constitutional guarantee that no person shall be deprived of life, liberty or property for arbitrary or capricious reasons. Harrah Independent District v. Martin, 440 U.S. 194, 198 (1979).

When protected property and liberty interests are at stake, any state action taken which affects those interests must be based upon substantial evidence. Moore v. Warwick Public School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986); Alsbury v. United States Postal Service, 530 F.2d 852 (9th Cir.), cert. denied, 429 U.S. 828 (1976); Vigil v. Post Office Department of The United States, 406 F.2d 921, 924 (10th Cir. 1969); Peters v. United States, 408 F.2d 719, 721-22, 724 (Ct. Cl. 1969); Denver Union Stock Yard Co. v. United

States, 21 F. Supp. 83, 90 (D. Colo. 1937), aff'd 304 U.S. 470 (1938); Allen v. State, 100 Nev. 130, 134, 676 P.2d 792, 794 (1984); cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 246-47 (1957).

In the instant case, not only was there no "substantial evidence" supporting the NCAA's deprivation of Tarkanian's property and liberty interests, there was no evidence. The evidence gathered by the Attorney General and UNLV's private counsel totally disproved all charges against Tarkanian. The NCAA arbitrarily and capriciously deprived Tarkanian of his property and liberty interests by suspending him in the face of such exculpatory evidence. Accordingly, the court below properly concluded that the NCAA deprived Tarkanian of substantive due process.

CONCLUSION

If this Court were to hold that the NCAA did not engage in state action in this instance, it would permit UNLV, a state institution, to avoid the restrictions placed upon it by the Constitution by simply relinquishing its governmental authority to the NCAA. Contrary to petitioner's contention, a decision to reverse the holding of the Nevada Supreme Court would require this Court to overturn well-settled law which began with Board of Regents v. Roth in 1972. Accordingly, NCAA's petition should be denied.

Respectfully submitted,

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